STATE OF MICHIGAN

COURT OF APPEALS

AJAY SHAH,

Plaintiff/Intervening Defendant-Appellant,

and

BHARATI SHAH,

Plaintiff-Appellant,

v

CITY OF FARMINGTON HILLS,

Defendant,

and

OXFORD ESTATES HOMEOWNERS ASSOCIATION,

Intervening Plaintiff-Appellee.

UNPUBLISHED
April 26, 2005

No. 252971
Oakland Circuit Court
LC No. 01-033790-CZ

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's orders granting intervening plaintiff, Oxford Estates Homeowners Association (the "association"), summary disposition pursuant to MCR 2.116(C)(10), and requiring plaintiffs to, among other things, dismantle existing landscaping on their property and submit plans and specifications for new landscaping to the association's Architectural Control and Safety Committee, awarding the association costs and attorney fees of $59,096.83 incurred in bringing this action to enforce its condominium bylaws, and denying plaintiffs' motions for reconsideration or relief from the trial court's orders and judgment. We affirm.

Plaintiffs first argue that the trial court erred in granting the association summary disposition. We disagree.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). The party opposing a motion for summary disposition may not rest on the mere allegations or denials contained in the pleadings but must come forward with evidence of specific facts to establish the existence of a material factual dispute. *Quinto, supra* at 361-362, 371.

Plaintiffs argue that Bharati Shah's affidavit demonstrated the existence of a material factual dispute precluding summary disposition and that the trial court erred by disregarding her affidavit. We do not agree.

Plaintiffs' position, as outlined in Bharati Shah's affidavit, is that the association lost the landscaping plans initially submitted by plaintiffs in August 1998, and that after plaintiffs provided additional copies they were told to disregard a letter from the association asking plaintiffs to submit supplementary plans. Plaintiffs contend that because the association did not reject their plans within thirty days of submission, the plans were deemed approved pursuant to the association's bylaws. Thus, plaintiffs argue, the association's correspondence seeking further materials is not relevant. The record, however, indicates that the association did not contest these matters for purposes of summary disposition. Rather than arguing that plaintiffs' August 1998 plans were never approved, the association argued that the driveway and the landscaping that plaintiffs ultimately installed were *different* from the driveway and landscape reflected in the plans submitted to the association in August 1998, and that because plaintiffs did not obtain required association approval for any changes from the plans submitted to the association, plaintiffs violated article VI, § 23(b) of the condominium bylaws.

We limit our consideration of this issue to the evidence that was presented to the trial court at the time the motion was decided. See *Office of Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 259 Mich App 279, 290; 674 NW2d 686 (2003), lv gtd 470 Mich 888 (2004). We shall not consider additional evidence cited by plaintiffs on appeal, including portions of Bharati Shah's three depositions, which were not timely presented below.

As argued by plaintiffs, in determining whether a question of material fact exists, the trial court may not weigh the credibility of witnesses or make findings of fact. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). Here, however, although the trial court referred to Bharati Shah's apparent lack of credibility, it acknowledged that it could not make credibility determinations for purposes of summary disposition and indicated that Bharati Shah's credibility was not a factor in its decision.

Bharati Shah's affidavit states that she submitted a landscape plan and a "plot plan" to the association in August 1998, which "included the circular driveway, [and] the Arizona Desert landscaping plan." Bharati claimed that she had one plot plan prepared with a straight driveway,

which she gave to the city because the city allegedly did not care what kind of driveway they installed, and a different plot plan prepared for the association, showing a circular driveway, which she gave to the association. However, the July 21, 1998, plot plan shows a straight driveway, not a circular driveway. Further, according to plaintiffs' architect, the December 1998 revision of the plot plan also contained a straight driveway, not a circular driveway, which the architect indicated was not incorporated into the plans for plaintiffs' home until January or February 1999.

In her deposition, Bharati Shah testified that the circular driveway may have been included in the landscape plan that she gave to the association. She stated that the landscape plan was prepared by a professional, but she could not recall the company's name or telephone number, and a copy of the landscape plan, which Bharati indicated may have been destroyed or stolen, was never produced.

On the basis of this evidence, we find that no reasonable person could conclude that the plans submitted by plaintiffs to the association in August 1998 contained a circular driveway. *Glittenberg, supra*. As previously noted, the July 1998 plot plan shows a straight driveway. Plaintiffs' attempt to distinguish between "plans" and "blueprints" is a matter of semantics that cannot create a question of fact. *Guardian Industries Corp v Dep't of Treasury*, 243 Mich App 244, 257; 621 NW2d 450 (2000). Further, plaintiffs failed to produce copies of the alleged plans or blueprints. Plaintiffs' conclusory allegations that such plans existed, devoid of detail, are insufficient to show that a question of material fact exists. *Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003); see also *Quinto, supra* at 371-372. Additionally, Bharati Shah may not create a question of fact by submitting an affidavit that contradicts her deposition testimony, in particular, by claiming that the circular driveway was included in an alleged "plot plan" when, at deposition, she testified only that there was a separate landscape plan that may have included the circular driveway. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001).

Reasonable persons could only conclude that the landscape plan would have had to be changed when, according to the evidence presented, plaintiffs' architectural firm changed the straight driveway to a circular driveway in January or February 1999. It is undisputed that no revised plans, whether plot or landscape, were ever submitted to the association. Further, the landscape plan said to have been submitted to the association in August 1998 could not possibly have included the thirty-four plantings in 2003, which were allegedly given to Bharati Shah as a surprise Mother's Day gift. We therefore conclude that plaintiffs failed to show a genuine issue of material fact concerning whether the driveway and landscape were changed without approval, and thus contrary to the bylaws, after the August 1998 plans were submitted to the association. Accordingly, the trial court properly granted the association's motion for summary disposition.

Additionally, we reject plaintiffs' argument that they are entitled to relief from the trial court's summary disposition order because the association misrepresented Bharati Shah's deposition testimony to the trial court, thereby committing fraud on the court.

In *Matley v Matley (On Remand)*, 242 Mich App 100, 101; 617 NW2d 718 (2000), this Court considered "whether a party can commit fraud on the court *by concealing a fact* from the court *or making a material misrepresentation* to the court when the relevant facts are known by

the opposing party." (Emphasis added). The Court observed that "'[a] fraud is perpetrated on the court when some material fact is concealed or some material misrepresentation is made to the court.'" *Id*., quoting *Valentino v Oakland Co Sheriff*, 134 Mich App 197, 207; 351 NW2d 271 (1984), aff'd in part and rev'd in part 424 Mich 310 (1986). Therefore, a "fraud on the court cannot be committed in an adversary proceeding with respect to facts not known to the court, but known by both parties." *Matley*, *supra* at 101-102. The Court in *Matley* further stated:

> We find . . . support for this conclusion in the Michigan Rules of Professional Conduct. Michigan Rule of Professional Conduct 3.3(d) provides that "[*i*]*n an ex parte proceeding*, a lawyer shall inform the tribunal of *all* material facts that are known to the lawyer and that will enable the tribunal to make an informed decision, *whether or not the facts are adverse*." (Emphasis added.) The comment following MRPC 3.3 addresses the difference between an advocate's duty during an ex parte proceeding and during an adversary proceeding, explaining that an advocate normally "has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party." It is only during an ex parte proceeding that the lawyer for the represented party has a duty "to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision." See Comment following MRPC 3.3. If an advocate generally has the responsibility to present only one side of the matters at issue, then a party cannot commit fraud on the court by failing to disclose to the court facts that are adverse to his position where the facts are known by the opposing party. [*Id*. at 102-103.]

In the present case, as in *Matley*, both parties were represented by counsel. Therefore, in its motion for summary disposition, the association "and its attorney had 'the limited responsibility of presenting one side of the matters that a tribunal should consider' to make its decision.'" *Id*., quoting MRPC 3.3. It was plaintiffs' responsibility to correct any incorrect statement of fact or omission of fact allegedly made by the association. *Id*. at 103-104. Consequently, the association did not commit fraud on the court by failing to raise evidence allegedly unfavorable to its position.

Next, plaintiffs argue that the trial court abused its discretion by denying their third motion for reconsideration or relief from judgment. We disagree.

MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). A trial

court's decision on a motion for relief from judgment is also reviewed for an abuse of discretion. *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004).

It is undisputed that Bharati Shah's deposition testimony was available when the association filed its motion for summary disposition. It is not an abuse of discretion to deny a motion for reconsideration "that rests on testimony that could have been presented the first time the issue was argued." *Churchman*, *supra*. Thus, plaintiffs' motion for reconsideration was properly denied.

A motion for relief from judgment may be granted on the basis of "[f]raud (intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." MCR 2.612(C)(1)(c); see also *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). Here, however, as previously discussed, the association did not commit fraud on the court. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for relief from judgment on this basis.

Plaintiffs next argue that the trial court erred in denying their motion for relief from the trial court's summary disposition order based on the affidavit of a member of the association's landscape committee. We again disagree.

A motion for relief from judgment may be granted for "[a]ny other reason justifying relief from the operation of the judgment." MCR 2.612(C)(1)(f); see also *Heugel*, *supra* at 478. However, "[i]n order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Id*. at 478-479. "Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it is rendered." *Id*. at 479. But because subsection (f) provides the court with broad equitable powers, relief may be granted even though some of the grounds alleged are arguably covered by subsections (a) through (e), provided that "additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand." *Id*. at 480-481.

In this case, the affidavit submitted by plaintiffs alleges misconduct by the association and, therefore, is arguably covered by MCR 2.612(C)(1)(c), thereby precluding relief under subsection (f). Further, given the history of this litigation, the association's substantial rights may be detrimentally affected if the order granting its motion for summary disposition is set aside. Most importantly, however, while the allegations of ethnic discrimination made in the affidavit are offensive, the affidavit does not show that extraordinary circumstances exist that mandate setting the order aside in order to achieve justice. Rather, as the trial court found, even if the affidavit is taken as true, it fails to show that "*the judgment* was obtained by the improper conduct of the party in whose favor it is rendered." *Heugel*, *supra* at 479 (emphasis added). Thus, even if certain association members harbored discriminatory motives as the affidavit alleges, the association demonstrated that plaintiffs violated the condominium bylaws by changing their driveway and landscaping without association approval, and it was that violation that gave rise to the order granting the association's motion for summary disposition. Thus, the trial court did not abuse its discretion in denying plaintiffs' second motion for relief judgment.

Lastly, plaintiffs argue that the trial court erred in awarding the association certain attorney fees incurred before intervening in this action, and in connection with plaintiffs' bankruptcy proceedings. Again, we disagree.

A trial court's decision regarding attorney fees is generally reviewed for an abuse of discretion. *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477, 486; 682 NW2d 519 (2004), lv pending. However, when the issue is whether a statute authorizes a particular award, the question presented is one of law that this Court reviews de novo. *Id*.

It is well-settled that attorney fees may not be recovered unless a statute, court rule, or common-law exception provides to the contrary. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Here, attorney fees and costs are authorized by § 206(b) of Michigan's condominium act, MCL 559.101 *et seq*., which states:

> In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding *and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide*. [MCL 559.206(b) (emphasis added).]

With respect to the "condominium documents" at issue here, article XI, § (1)(b), of the association bylaws states:

> In any proceeding arising because of an alleged default by any Co-owner, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees (*not limited to statutory fees*) as may be determined by the Court, but in no event shall any Co-owner be entitled to recover such attorneys' fees. [Emphasis added.]

While the clear language of MCL 559.206(b) and the association bylaws limit the recovery of costs to "the costs of the proceeding," an award of attorney fees is not similarly limited. Rather, under MCL 559.206(b), the association may recover "reasonable attorney fees, as determined by the court." Additionally, the condominium bylaws allow the recovery of "such reasonable attorneys' fees (not limited to statutory fees) as may be determined by the Court." Thus, as long as the trial court properly determines that particular attorney fees were reasonably incurred by reason of a co-owner's default, they are recoverable under both MCL 559.206 and the association bylaws.

The trial court specifically found that, contrary to plaintiffs' evidentiary hearing testimony, both bankruptcy petitions were motivated, at least in part, by plaintiffs' desire to delay resolution of this case. The court further found that the association was required to participate in the bankruptcy proceedings in order to protect its rights, given plaintiffs' refusal to cooperate in lifting the automatic bankruptcy stays. From this, the court concluded that the association was entitled to recover its full costs and attorney fees reasonably incurred in enforcing the bylaws against plaintiffs, including costs and fees incurred before filing the intervening complaint, and those incurred in connection with plaintiffs' bankruptcy petitions. We find no abuse of discretion in the trial court's determination that the challenged attorney fees

were reasonably incurred. Accordingly, the award of attorney fees pursuant to MCL 559.206(b) and the association bylaws, was proper.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra